No. 56432-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Appellant

v.

BROOKE HAGEN,
Respondent.

BRIEF OF RESPONDENT

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I. RESPONSE ARGUMENT

1. The trial court correctly found that it never had personal jurisdiction over Ms. Hagen because the State never lodged a valid criminal charge against her.

RCW 69.50.4013 never properly defined a crime. It criminalized "innocent passivity" and violated the federal and state rule that "passive and wholly innocent nonconduct falls outside the State's police power to criminalize." *State v. Blake*, 197 Wash. 2d 170, 185, 481 P.3d 521, 530 (2021). If a statute is unconstitutional, it is and has always been a legal nullity. *State ex rel. Evans v. Brotherhood of Friends*, 41 Wash.2d 133, 143, 247 P.2d 787 (1952).

"Jurisdiction means the power to hear and determine." *State ex rel. McGlothern v. Superior Court*, 112 Wash. 501, 505, 192 P. 937 (1920). There are three types of jurisdiction: "jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment." *Marriage of Little*, 96 Wash.2d 183, 197, 634 P.2d 498 (1981). The trial judge found that the trial court never had personal jurisdiction over Ms. Hagen because she was charged with bail-jumping when she had

committed no crime. CP 10. This was correct. The State's arguments to the contrary must be rejected because they relate to subject matter jurisdiction not personal jurisdiction.

Washington courts only have jurisdiction over a person who commits a crime. RCW 9.04.030. The trial court's power to order a defendant to appear in court to answer for the crime arises only when the court's jurisdiction over the person has been established by the filing of an affidavit establishing probable cause to believe that an offense has been committed. RCW 10.16.080. Only then can the court order the defendant to appear either with a summons or an arrest warrant. On the other hand: "If it should appear upon the whole examination that no offense has been committed, or that there is not probable cause for charging the defendant with an offense, he or she shall be discharged." *Id*.

The former bail-jumping statute, RCW 9A.76.170, stated:

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail-jumping.

In *State v. Downing*,122 Wash. App. 185, 93 P.3d 900 (2004), the Court said this statute had three elements (1) the accused was held for, charged with, or convicted of a crime; (2) the accused possessed knowledge of the requirement of a subsequent personal appearance; and (3) the accused failed to appear as required.

The first line of the statute states that the charge presumes the defendant has "been released by court order or admitted to bail." This can only be read to mean the State has filed an valid information or arrest warrant establishing probable cause to believe a crime has been committed. But "if it should appear upon the whole examination that no offense has been committed" the trial court lacks any power over the person and cannot compel that person, much less punish them, for violating a court order from a judge who had no personal jurisdiction over the defendant. Any conviction based on an order to appear when the trial court lacked jurisdiction over the defendant is void.

There was never a valid, constitutional criminal charge under RCW 69.50.4013. As a result, the trial court did not have the authority to enter an

order requiring Ms. Hagen to appear in court or to punish her when she did not.

Downing is clearly distinguishable because there the defendant was charged under a statute – unlawful issuance of bank checks - that properly defined a crime and has never been deemed unconstitutional. From the start of his prosecution until the charges were later dismissed the trial court had jurisdiction over Mr. Downing and had the power to order him to appear and punish him for failing to do so.

The decision in *State v. Paniagua*, No. 38274-5-III, 2022 WL 2071581, at *3 adopts the same flawed analysis of *Downing* as the prosecutor espouses here. As a result, this Court should decline to follow it. The opinion states that former RCW 9A.76.170 requires proof "only that [the defendant] be under charges at the time of the failure to appear."

But as the trial court recognized here, bail-jumping cannot be premised simply on "a charge." It must depend on a ***valid*** criminal charge. Without a valid criminal charge, the court had no jurisdiction over Ms. Hagen such that it could force her to appear. And, without that authority, there is no basis to convict or punish Ms. Hagen for bail-jumping.

The cases cited by the state all concern subject matter jurisdiction. The out of state cases do not address RCW 9.04.030 or 10.16.080.

2. Escape is distinguishable from bail-jumping.

The State cites *State v. Gonzalez*, 103 Wash. 2d 564, 693 P.2d 119 (1985), but fails to address the difference between bail-jumping and escape. There are substantial reasons for distinguishing an escape from a bail-jumping in this context. In order to be guilty of escape, a defendant must leave a custodial facility. Doing so reveals clear culpability and a criminal intent. But bail-jumping presumes missing court for pro forma, administrative hearings for any reason – including something as innocent as forgetting one's court date. Thus, applying the rule in *Gonzales* to a bail-jumping conviction is unduly harsh and inapt.

The Supreme Court has recognized that bail-jumping is insignificant evidence of criminality. In *State v. Slater*, 197 Wash. 2d 660, 670–71, 486 P.3d 873, 879 (2021), the State argued that Slater's failure to appear for a pretrial hearing was "evidence of flight." The Court rejected that argument noting:

> [I]n this case we are faced with what may be the most tenuous and speculative form of alleged flight evidence: the single FTA accompanied by a motion to quash just over one month later. We hold that evidence of a single FTA accompanied by a prompt motion to quash the issued warrant is not sufficient evidence of flight and, therefore, cannot be used as evidence from which to infer consciousness of guilt on the underlying crime.

The Court also said:

> Not all FTAs are flight evidence and not all flight evidence infers a consciousness of guilt. There are many innocent reasons people fail to appear for court, and courts must consider these circumstances. This includes the disproportionate effect that criminalizing FTAs has on persons of lower socioeconomic classes and the legislature's shift away from the criminalization of FTAs accompanied by motions to quash.

Id. at 674.

3. This court should ameliorate the State's unfair charging practices regarding bail-jumping.

It may well be the statute is intended to compel defendants to appear in court. But that is not how the State historically used bail-jumping charges. Prosecutors used bail-jumping to increase defendants offender scores to force defendants into pleading. *See* Aleksandrea E. Johnson, *Decriminalizing Non-Appearance in Washington State: The Problem and Solutions for*

Washington's Bail-Jumping Statute and Court Nonappearance, 18 Seattle J. for Soc. Just. 433, 434 (2020) cited with approval in *State v. Slater, supra*. Unbridled prosecutorial discretion to charge bail jumping has resulted in substantial unfairness. For example *State v. Bergstrom*, 199 Wash. 2d 23, 29–30, 502 P.3d 837 (2022), the Court expressed concern when in 2018 the State charged the defendant with bail jumping even though he was given a confusing scheduling order, and "was not aware of" a pretrial conference because, at that time, he struggled to remain in contact with his attorneys and parole officer—he was homeless, had no phone, and was using drugs. *Id*. at 45, also citing with approval Johnson, 18 Seattle J. for Soc. Just.

In 2020, the Legislature amended RCW 9A.76.170 to ameliorate the unfair application of the former statutory scheme. It substantially rewrote the statute to limit the State's ability to charge bail-jumping.

This Court should affirm the trial judge for these reasons as well.

II. CONCLUSION

This Court should affirm the trial court's order of dismissal.

This brief is complies with RAP 18.17 and contains 1,437 words.

DATED this 1st day of July, 2022.

Respectfully submitted,

/s/ Suzanne Lee Elliott
Suzanne Lee Elliott, WSBA #12634

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	)	
Appellant,	)	
	)	
v.	)	NO. 56432-7-II
	)	
BROOKE HAGEN,	)	
	)	
Respondent.	)	

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